Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, *et al.*,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS

JOHN M. CANNON
*SUSAN W. WANAT
ANN PLUNKETT SHELDON
Attorneys for *Amicus Curiae*

*Counsel of Record for *Amicus Curiae*
MID-AMERICA LEGAL FOUNDATION
Suite 1725
20 North Wacker Drive
Chicago, Illinois 60606
(312) 263-5163

Pandick Midwest, Inc., Chicago • (312) 454-7600

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Sherman Antitrust Act Pre-Empts the Berkeley Rent Control Initiative	5
A. The Ordinance Mandates Anticompetitive Activity Expressly Prohibited by Federal Antitrust Laws	5
B. The Anticompetitive Effect of the Ordinance Frustrates the Procompetitive Objectives of the Sherman Act	8
II. The Berkeley Ordinance Cannot Claim Exemption From the Federal Antitrust Laws	12
A. The Berkeley Ordinance Does Not Satisfy the State Action Test Developed by *Parker* and its Progeny	12
B. The New Standard Fashioned by the California Supreme Court is Inconsistent With the Legal Basis for the *Parker* Exemption	19
C. The California Supreme Court Misapplied its Own Novel Standard	22
CONCLUSION	23

TABLE OF AUTHORITIES

	PAGE
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)	7
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	7, 12, 17
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	12, 20
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	6, 12, 14, 17
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	7
First American Title Company of South Dakota v. South Dakota Land Title Ass'n, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 709 (1984)	6
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1962)	5
Hines v. Davidowitz, 312 U.S. 52 (1941)	5, 12
Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Board, ___ U.S. ___, 104 S.Ct. 2518 (1984)	5
Nash v. Florida Industrial Commission, 389 U.S. 235 (1967)	8
Northern Pacific Ry v. United States, 356 U.S. 1 (1958)	9
Parker v. Brown, 317 U.S. 341 (1943)	4, 12
Rice v. Norman Williams Co., 458 U.S. 654 (1982)	4-7

	PAGE
Southern Motor Carriers Rate Conference, Inc. v. United States, ___ U.S. ___, 105 S.Ct. 1721 (1985)	15, 16, 18
Town of Hallie v. City of Eau Claire, ___ U.S. ___, 105 S.Ct. 1713 (1985)	15, 16
United States v. Socony-Vacuum, 310 U.S. 150 (1940)	7
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	9
Statutes and Constitutional Provisions	
U.S. CONST. art. VI, cl.2	5
15 U.S.C. § 1 (1976)	6
§ 35	18
Cal. Govt. Code § 65300	21
§ 65302	21
§ 65583	14, 16, 21
§ 65589	16
Wisconsin Stat. § 62.18	15
Wisconsin Stat. Ann. § 66.069(2)(c) (Supp. 1984)	15
Other	
Baird, RENT CONTROL: THE PERENNIAL FOLLY (1980)	10, 22
Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 Hastings Const. L. Q. 255 (1983)	9

PAGE

Friedman and Stigler, *Roofs or Ceilings? The Current Housing Problem,* in (RENT CONTROL: A POPULAR PARADOX) 93 (1975) 9-11

Hayek, *The Repercussions of Rent Restrictions,* in (RENT CONTROL: A POPULAR PARADOX) 75 (1975)..... 11

Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L. J. 691 (1983) 9

Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences,* 69 Cornell L. Rev. 517 (1984)..... 10

Sternleib and Hughes, *Rent Control's Impact on the Community Tax Base* in (AMERICA'S HOUSING: PROSPECTS AND PROBLEMS) 267 (1980)..... 11

H. R. Rep. No. 965, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602..... 18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, *et al.,*
Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, *et al.,*
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS

This brief *amicus curiae* in support of appellants is submitted with the written consents of counsel to all parties filed with the Clerk of the Court.

INTEREST OF AMICUS

Mid-America Legal Foundation has an interest in the disposition of this case which is before this Court on appeal from the Supreme Court of California. The Foundation was organized to support the public interest in preserving the economic and political freedoms of our democratic society. Mid-America seeks to present a broad perspective on the important antitrust principles at stake in this case, based upon

the Foundation's longstanding concern with the relationship between government and the free enterprise system.

The California Supreme Court has carved an exception to the Sherman Act which has the potential of cloaking a wide range of municipal regulatory activity with antitrust immunity. According to the test created by the court below, once a municipality determines that a public welfare need exists, it may proceed with near impunity to control competition in the relevant market, notwithstanding the federal antitrust laws. Widespread application of such an exception to regulate commercial activity could cripple the competitive enterprise system.

SUMMARY OF ARGUMENT

The court below created a new rule of law which places municipal price-fixing activity beyond the reach of the federal antitrust system. This "municipal welfare" exemption conflicts with the century-old consensus, embodied in Congressional statutes and in the precedents of this Court, that only sovereign governments may authorize departure from the standard of free competition.

The Berkeley rent control ordinance violates the Supremacy Clause of the United States Constitution on two separate grounds. According to established principles developed by this Court, the measure is pre-empted by the Sherman Act, because it mandates price-fixing conduct which is in all cases a *per se* violation of the Act. In addition, the scheme at issue frustrates the procompetitive purposes of the federal antitrust legislation, because it stifles competition among present and potential providers of housing services in the Berkeley rental market.

The Berkeley initiative cannot claim exemption from the federal antitrust laws as state action. The state action doctrine, as developed by *Parker* and its progeny, extends antitrust immunity to municipalities only where the local government acts pursuant to a "clearly articulated and affirmatively expressed" state policy. California statutes neither clearly articulate a state policy in favor of rent control nor affirmatively grant to municipalities the power to enact rent control. Therefore, the anticompetitive Berkeley rent control scheme cannot shield itself from antitrust scrutiny under the guise of state action.

In addition, the California Supreme Court ignored established law and fashioned a new standard by which to evaluate the anticompetitive activities of municipalities. The court, moreover, misapplied its own test when it sustained an overly broad rent control plan that fails to qualify as the "least intrusive means" of achieving articulated housing goals.

ARGUMENT

In examining the Berkeley rent control ordinance at issue in this case, the California Supreme Court concluded that "if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purpose could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies." *Fisher v. City of Berkeley,* Juris. Stmt. App. 1,2. The court admitted that its test represented unprecedented "wander[ing] off the map and travel[ing] cross country", but it is not true that this wandering occurred "without the benefit of trail or compass." Juris. Stmt. App. at 15. The state court had available to it a reasonably well-defined body of principles developed by this Court, but it failed to apply them properly.

The confusion below stemmed from a neglect to keep separate the analytically distinct domains of federal legislative pre-emption, Sherman Act violation doctrine, and the state action antitrust immunity of *Parker v. Brown,* 317 U.S. 341 (1943) and its progeny. The opinion of the California Supreme Court reads like a jurisprudential goulash, blending together heretofore discrete ingredients to produce an exotic new dish, the "municipal welfare" exemption from federal antitrust scrutiny. This novel outcome results from a muddled analysis at odds with the functional two-step approach employed by this Court in *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982). In light of *Rice,* the proper inquiry has nothing to do with the obfuscating evaluation of local purposes and powers engaged in by the court below. Rather, the validity of anticompetitive regulation is determined by asking two straightforward and familiar questions. First, is the regulation foreclosed by federal antitrust law according to traditional pre-emption principles? 458 U.S. at 659. Second, if pre-emption is prescribed, is the

measure immunized from invalidation by the *Parker* state action doctrine? *Id.* at 662-63 n.9. The answers to these questions, inopportunely tangled by the California Supreme Court, mandate overturning the Berkeley ordinance.

I. THE SHERMAN ANTITRUST ACT PRE-EMPTS THE BERKELEY RENT CONTROL INITIATIVE.

A. The Ordinance Mandates Anticompetitive Activity Expressly Prohibited by Federal Antitrust Laws.

The doctrine of federal legislative pre-emption is based on the Supremacy Clause, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, Any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Federal law voids or "pre-empts" local (state, county, municipal, etc.) law to the extent that the latter "actually conflicts" with national law. *Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board,* ____ U.S. ____, 104 S.Ct. 2518, 2523 (1984). Such a conflict arises when compliance with both local and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963), or when the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

In the present case, the Berkeley initiative cannot pass muster under the "actual conflict" pre-emption test. As the California Supreme Court recognized below, the Berkeley ordinance mandates "price-fixing". Juris. Stmt. App. at 2. The tension between the purposes, language, operation, and necessary effect of the rent control scheme at issue and the Sherman

Act[1] simply cannot be reconciled. Therefore, as one federal circuit recently concluded, "[a]bsent the state action doctrine, the Sherman Act preempts the conflicting [city] regulation." *First American Title Company of South Dakota v. South Dakota Land Title Association,* 714 F.2d 1439, 1451 (8th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 709 (1984).

A seven member majority of this Court agreed in *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982), upon an analytical framework for determining when a facial challenge to a state statute will be sustained on Sherman Act pre-emption grounds. *A municipal ordinance* like the Berkeley measure, which enjoys little if any independent antitrust protection, *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982), is *a fortiori* subject to the *Rice* regime. In *Rice,* this Court upheld a California statute prohibiting state-licensed alcoholic beverage importers from purchasing any brand of distilled spirits unless they were designated as an authorized importer by the brand owner. The statute was found to be facially reconcilable with the Sherman Act because it authorized a vertical nonprice restraint which, according to traditional antitrust analysis, may or may not involve undue anticompetitive consequences depending upon specific applications of the statutory designation power. The opinion generalized, however, that

> [a] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct

[1] Section 1 of the Sherman Antitrust Act of 1890 provides in pertinent part that "[e]very . . . combination . . . in restraint of trade among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (1976).

> contemplated by the statute is in all cases a *per se* violation.[2]

458 U.S. at 661.

Nothing in antitrust jurisprudence is more settled than the doctrine that price-fixing constitutes such a *per se* violation of the Sherman Act. *See, Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 407-09 (1911); *United States v. Socony-Vacuum,* 310 U.S. 150, 223 (1940); *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 342-57 (1982). Significantly, this Court has applied *per se* violation analysis unanimously to strike down a price maintenance requirement embodied in state statute. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980). In *Midcal,* the Court examined a statute that required members of the California wine industry to file fair trade contracts or price schedules with the state, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers must post a resale price schedule for that producer's brands. The statute was held to facially conflict with the Sherman Act because it mandated resale price maintenance. 445 U.S. at 102-103. As the Court pointed out two years later in *Rice, Midcal*-type price maintenance is "an activity that has long been regarded as a *per se* violation of the Sherman Act." 458 U.S. at 659-60.

The *Midcal* price maintenance program held to conflict with the Sherman Act is substantially indistinguishable in effect

[2] As the Court earlier explained, *id.* at 659-60 n.5, "[u]nder established antitrust principles, *per se* rules of illegality are appropriate only when they apply to practices 'which because of their pernicious effect on competition and lack of redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 50 (1977), *quoting Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5 (1958)."

from the Berkeley rent control scheme at issue. Both the voided state statute voided in *Midcal* and the municipal ordinance here at issue combine private economic actors into a cartel of generic "suppliers" forced to maintain fixed charges for provision of their property and services. In light of *Midcal* and *Rice* such price-fixing activity amounts to a *per se* violation which cannot be reconciled with the paramount federal antitrust statute.

B. The Anticompetitive Effect of the Ordinance Frustrates the Procompetitive Objectives of the Sherman Act.

In addition to the strong implication in *Rice* that local government actior which mandates a *per se* Sherman Act violation is *ipso facto* pre-empted by federal law, it is clear that the anticompetitive ordinance at issue conflicts with the staunchly procompetitive policy of the national antitrust regime. The Sherman Act pre-empts the Berkeley regulation because the latter serves to " 'retard, impede, burden . . . or control the operation of . . .,' [or] 'frustrates the purpose of . . .,' [or stands] 'as an obstacle to the accomplishment and execution of' " the Sherman Act's national objectives. *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), *quoting respectively McCulloch v. Maryland,* 17 U.S. 316, 436 (1819); *Davis v. Elmira Savings Bank,* 161 U.S. 275, 283 (1896); *Hill v. Florida,* 325 U.S. 538, 542 (1945). The *raison dètre* of the Sherman Act—indeed, of our entire complicated antitrust system—is competition. As the late Justice Black noted,

> [t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained inter-action of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958). In a similar vein, Justice Marshall, speaking for the Court in *United States v. Topco Associates, Inc.,* 405 U.S. 596 at 610 (1972), has affirmed that

> [a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Such rhetoric carries with it implicit recognition of the "quasi-constitutional character of the national antitrust laws." Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze,* 10 Hastings Const. L. Q. 255, 261 (1983). In light of this fundamental character it is apparent that any state or local law which requires departure from the overwhelmingly clear Sherman Act mandate for free competition carries a heavy burden of justification. Local rent control in general, and the *Berkeley* ordinance in particular, cannot carry that burden, because such measures inevitably stifle competition for housing services.

Rent control is replete with anticompetitive consequences that affect the housing market. The most immediate effect occurs through the fundamental principles of supply and demand: an artificially low price for housing services causes an increase in the quantity of such services demanded. Since the housing stock remains relatively constant in the short run, this increased quantity demanded manifests itself as a housing shortage. Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L. J. 691, 694 (1983). As Professors Milton Friedman and George Stigler have flatly stated, "the legal ceilings on rents are the reason why there are so few places for rent." *Roofs or Ceilings? The Current Housing*

Problem, in RENT CONTROL: A POPULAR PARADOX 93 (1975) (hereinafter cited as Friedman and Stigler). Rent control has frequently been touted as a cure rather than a cause for housing shortage, but such reasoning inevitably leads to a circular argument in favor of rent control:

> [a]s long as the shortage created by rent ceilings remains, there will be a clamor for continued rent controls. This is perhaps the strongest indictment of ceilings on rents. They, and the accompanying shortage of dwellings to rent, perpetuate themselves, and the progeny are even less attractive than the parents.

Friedman and Stigler at 100.

The shortage of units under rent control results in arbitrary allocation of housing services. Rent control favors current tenants at the expense of prospective tenants, including the young and newcomers, both important segments of the Berkeley community due to the presence of the University of California. Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences,* 69 Cornell L. Rev. 517, 555 (1984). Competition among these prospective tenants for the short supply of housing shifts from the price arena to such criteria as race, social status, presence of children, and sheer doggedness in the search for an apartment. In the traditional economic sense, tenant competition for rental housing is drastically curtailed.

Further, over the long run, rent control results in the deterioration of rental housing through the lack of maintenance and new improvements. No matter at what level rent is fixed, the landlord will attempt to extract profit from his or her investment by cutting expenses to the detriment of the property. Baird, RENT CONTROL: THE PERENNIAL FOLLY 64 (1980) (hereinafter cited as Baird). Landlords thus face strong disincentives to compete in making their buildings attractive.

Perhaps the most serious long term effect of rent control is that it discourages new construction of rental housing. According to Professors Friedman and Stigler, "[r]ent ceilings do nothing to alleviate this shortage. Indeed, they are far more likely to perpetuate it: the implications of the rent ceilings for new construction are ominous." Friedman and Stigler at 99. The Berkeley ordinance attempts to avoid this pitfall by exempting new construction from rent control. Juris. Stmt. App. 115. This promise of a market return on new construction, however, is illusory. Since new buildings may become subject to rent controls sometime in the future, investors require an even higher profit percentage before they will underwrite rental housing. This tends to stifle construction which might otherwise occur.

In addition to the foregoing, rent control fosters a variety of other consequences that tend to reduce competitive efficiency. For example, rent control can increase taxes on all municipal properties because it diminishes rental housing property values. *See* Sternlieb and Hughes, *Rent Control's Impact on the Community Tax Base,* in AMERICA'S HOUSING: PROSPECTS AND PROBLEMS 267 (1980). Likewise, rent control discourages the efficient use of labor because it decreases the mobility of workers, who are unable to find shelter in the shortage environment fostered by the controls. Hayek, *The Repercussions of Rent Restrictions,* in RENT CONTROL: A POPULAR PARADOX 74 (1975). Workers tend to stay unemployed longer than would otherwise be the case if their geographical horizons are limited.

To conclude, the Berkeley ordinance effectively cripples price competition, the central nervous system of any free market. It is therefore impossible to view the present rent control measure as anything but an obstacle to the accomplishment and execution of the full procompetitive purposes

and objectives embodied in the Sherman Act. *Hines v. Davidowitz,* 312 U.S. at 67. According to established pre-emption doctrine, then, the Supremacy Clause of the United States Constitution requires that the Berkeley ordinance be invalidated.

II. The Berkeley Ordinance Cannot Claim Exemption From the Federal Antitrust Laws.

A. The Berkeley Ordinance Does Not Satisfy the State Action Test Developed by *Parker* and its Progeny.

This Court established the state action exemption from federal antitrust scrutiny by declining to apply the Sherman Act to the anticompetitive conduct of a state acting through its legislature. *Parker v. Brown,* 317 U.S. 341, 350-351 (1943). *Parker* emphasized principles of federalism and state sovereignty, holding that the Sherman Act was intended to prohibit private restraints on trade and not to "nullify a state's control" in activities directed by the legislature. 317 U.S. at 351.

Municipalities, on the other hand, are not beyond the reach of the federal antitrust laws, because they are not themselves sovereign. *City of Lafayette v. Louisiana Power and Light Co.,* 435 U.S. 389, 412 (1978) (opinion of Brennan, J.). To obtain exemption, municipalities must demonstrate that their anticompetitive activities are authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. *Lafayette* attempted to set guidelines to determine when a municipality is acting "pursuant to state policy". The Court warned, however, that "the state may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful." *Id.* at 414, *citing Parker,* 317 U.S. at 351.

In essence, *Lafayette* suggested that a municipality can obtain state action immunity only by showing that it acted pursuant to a "clearly articulated and affirmatively expressed . . . state policy" that is "actively supervised" by the State. *Id.* at 410. This test was subsequently articulated and adopted by a majority of this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).

The two-pronged *Lafayette* test was first applied to the anticompetitive activities of a municipality in *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982). *Boulder* involved a dispute between the city of Boulder, Colorado, and the assignee of a permit to conduct a cable television business within the city. The cable company charged that the city council's moratorium ordinance, which intended to encourage entry of new businesses into the market, violated section 1 of the Sherman Act. The city claimed exemption from antitrust liability, because the Colorado legislature had granted municipalities general "home rule" powers.

Boulder held that a "home rule" municipality that is granted extensive powers of self-government in local and municipal matters by the state constitution is not exempt from the Sherman Act under the state action doctrine. 455 U.S. at 56. The Colorado legislature's "guarantee of local autonomy" was not a "clear articulation and affirmative expression" of a state policy authorizing anticompetitive activity. *Id.* This Court stated that the home rule provision of the state constitution merely expresses Colorado's neutrality toward Boulder's anticompetitive activity:

> A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as 'comprehended within the powers *granted,*' since the term, 'granted', necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The

> relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged, '[W]e are here concerned with city action in the absence of any regulation whatever by the State of Colorado. Under these circumstances, there is no interaction of State and local regulation. We have only the action or exercise of authority by the City.'

Id. at 55 (emphasis by the Court). *Boulder* stands for the principle that any state government action is not *ipso facto* exempt from the Sherman Act under the *Parker* doctrine. To be immunized from antitrust liability, any subordinate state entity must act pursuant to a "clearly articulated and affirmatively expressed" state legislative policy which is specific enough to show that the legislature not only contemplated the anticompetitive actions, but that it granted the municipality the authority to engage in such conduct.

In the present case, there is neither a specific grant of authority, nor a clearly articulated or affirmatively expressed state policy which immunizes Berkeley's rent control ordinance from the Sherman Act. The California Legislature does grant its municipalities the broad authority to preserve, improve and develop housing. Cal. Govt. Code § 65583.[3] However, this grant of authority is very similar to the "home rule" grant in *Boulder* which this Court found insufficient to satisfy the "clear articulation and affirmative expression" standard.

---

[3] Cal. Govt. Code § 65583 describes what the objectives of a municipality's housing plan are to be and in pertinent part reads: "[t]he housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives and scheduled programs for the preservation, improvement and development of housing. The housing element shall identify adequate sites for housing, . . . and shall make adequate provision for existing and projected needs of all economic segments of the community.

Recent cases concerning the application of the state action exemption to municipalities delineate further what state activity satisfies the "clear articulation and affirmative expression" test. In *Town of Hallie v. City of Eau Claire,* ____ U.S. ____, 105 S.Ct. 1713 (1985), and *Southern Motor Carriers Rate Conference, Inc. v. United States,* ____ U.S. ____, 105 S.Ct. 1721 (1985), this Court refined the guidelines which govern how clearly a state policy must be articulated in order for a municipality to establish that its anticompetitive activity constitutes state action. In *Hallie,* unincorporated townships adjacent to Eau Claire alleged that the city had violated the Sherman Act by tying the provision of sewage treatment, in which it enjoyed an area-wide monopoly, to the provision of sewage collection and transportation services, in which the townships wished to compete with the city. Eau Claire refused to treat the townships' sewage, but did extend treatment services to individual township residents if they voted to have their homes annexed by Eau Claire and agreed to use the city's collection and transportation services.

This Court held that the municipality's anticompetitive activities were protected by the state action exemption to the federal antitrust laws, and cited several Wisconsin statutes which *specifically grant* to cities the power to restrict unannexed territories' access to city sewage services. 105 S.Ct. at 1718. The Wisconsin legislation involved in *Hallie* grants authority to cities to construct, add to, alter and repair sewage systems, and to "describe with reasonable particularity the district to be [served]." Wisconsin Stat. § 62.18(1) (1982). Furthermore, Wis. Stat. Ann. § 66.069(2)(c) (Supp. 1984) (emphasis supplied), provides that a city operating a public utility.

> . . . may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the *municipal utility shall have no obligation to serve beyond the area so delineated.*

The *Hallie* Court concluded that the clear articulation requirement of the state action test was satisfied since the statutory provisions plainly show that "the legislature contemplated the kind of action complained of." *Town of Hallie,* 105 S.Ct. at 1719, *quoting Lafayette,* 435 U.S. at 415. In short, the *Parker* doctrine placed Eau Claire beyond the reach of federal antitrust law because the Wisconsin legislature specifically granted municipalities the authority to engage in precisely the conduct which formed the basis of the townships' complaint.

In a case decided the same day as *Town of Hallie,* a motor carriers' rate conference's anticompetitive activities were held immune from federal antitrust liability, on the ground that the private ratemaking involved was conducted pursuant to "clearly articulated state policy" in the four states involved. *Southern Motor Carriers Rate Conference, Inc. v. United States,* 105 S.Ct. 1721. This Court found a "clear articulation" of policy because three of the states had statutes expressly permitting collective ratemaking, and the fourth had clearly articulated its intent to displace price competition among common carriers with a regulatory structure. 105 S.Ct. at 1731-32. Again, as in *Town of Hallie,* the anticompetitive conduct was protected by the state action exemption only because the legislatures' intent to do so was expressly stated. *Id.*

In the case at bar, California law is considerably less specific than the Wisconsin statutes construed in *Town of Hallie.* The latter expressly authorize the precise municipal action challenged under the antitrust laws, whereas the California statutes only require municipalities to develop a housing plan without specifying what actions the municipality can take to control and develop housing. Cal. Govt. Code § 65583.

Furthermore, it can hardly be said that the state legislature contemplated Berkeley's use of extensive rent controls to further state housing policy. In its only specific mention of "rent control" in the California statutes, the state legislature takes a position of mere neutrality. Cal. Govt. Code § 65589(b) states:

> [n]othing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

This type of legislative indifference was addressed by this Court in *Boulder* when it stated that

> the requirement of 'clear articulation and affirmative expression is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as 'comprehended with the powers *granted,*' since the term 'granted' necessarily implies an affirmative addressing of the subject by the State. . . .

455 U.S. at 55 (emphasis by the Court, footnote omitted).

The California statutes merely allow municipalities to "do as they please" to further state housing policy, and expressly take a "neither here nor there" stance on rent control. "Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that [the] precedents require." *Boulder,* 455 U.S. at 56. Thus, since the state of California has not clearly articulated a state rent control policy nor affirmatively expressed a grant of authority to municipalities to enact rent controls, the Berkeley ordinance fails to satisfy the first prong of this Court's state action test.

The Berkeley ordinance proves inadequate under the second prong of this test as well. The standard requires that the anticompetitive conduct of subordinate entities be "actively supervised by the state" to ensure immunity from federal antitrust laws. *Midcal,* 445 U.S. at 97. "Where a state or

municipal regulation of a private party is involved, . . . active state supervision must be shown, even where a clearly articulated state policy exists." *Town of Hallie,* 105 S.Ct. at 1720 n.10, *citing Southern Motor Carriers,* 105 S.Ct. at 1731.

In the present case, private parties are regulated by the municipality, and the record reveals no state supervision of this regulation. The Berkeley Rent Stabilization Board does not act as an arm of the state and apparently does not report to any state agency. In effect, the city of Berkeley is administering a price fixing scheme on its own without any state involvement. Thus, the failure of the ordinance to meet the second requirement for immunity is self-evident.

It should be noted that Congress has reaffirmed the state action doctrine outlined above as the yardstick by which to measure municipal immunity from the federal antitrust laws. Congress considered this issue during its enactment of the Local Government Antitrust Act of 1984, and concluded that

> H.R. 6027 [which became the Local Government Antitrust Act of 1984, 15 U.S.C. § 35, Public Law 98-544] would in no way limit the antitrust immunity for States that the courts have recognized in *Parker v. Brown,* 317 U.S. 341 (1943), and subsequent decisions interpreting the 'state action' doctrine. The bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law. For example, *there will be no change in the substantive antitrust law applicable to local governments* . . . .

H.R. Rep. No. 965, 98th Cong., 2d Sess. 2-3, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602, 4603 (emphasis supplied).

During hearings on this issue, the House Judiciary Committee examined a number of witnesses, including state and local officials, Justice Department antitrust lawyers, and other interested persons, who argued for and against adoption of several alternative bills that would have explicitly extended *Parker* immunity to local governmental units in certain enumerated circumstances. The House Report states: "[a]lthough the Committee received testimony favoring broader immunity for local governments, it chose at this time to address only the issue of antitrust damage suits." *Id.* at 2, 4602. Therefore, having formally considered the question of immunity from federal scrutiny, Congress has acquiesced in the judicial application and development of current legal doctrine defining the scope of potential municipal antitrust liability.

In conclusion, Berkeley's rent control ordinance is not exempt from federal antitrust laws under the state action doctrine. The California legislature has neither "clearly articulated" nor "affirmatively expressed" a state policy in favor of rent control. Furthermore, the Berkeley rent control ordinance is enforced without any state supervision. Therefore, in accord with this Court's decisions in *Lafayette, Boulder* and *Town of Hallie,* and Congress' acquiescence in the judicial application of the state action doctrine, Berkeley cannot claim immunity from the antitrust laws.

B. The New Standard Fashioned by the California Supreme Court is Inconsistent with the Legal Basis for the *Parker* Exemption.

Because the California Supreme Court claimed that "this case forces us to wander off the map and travel cross country without the benefit of a trail or compass," Juris. Stmt. App. 15, it adopted an unprecedented standard by which to evaluate the applicability of the federal antitrust laws to municipal action. This standard articulated below departs from the well-defined

principles developed by this Court. The California court concluded that

> if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the City's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

Juris. Stmt. App. 31. By ignoring this Court's requirement that only "clearly articulated and affirmatively expressed" state policy may exempt municipal action from federal antitrust scrutiny, the California court granted municipalities unwarranted freedom to initiate anticompetitive conduct. This grant of power to municipalities to violate the Sherman Act regardless of the presence or absence of clearly articulated state policy directly contradicts this Court's rationale in extending the *Parker* exemption to municipalities in the first place. *See, City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The law extends antitrust immunity to a municipality only when it acts directly as an arm of the sovereign state. The California court's standard, however, would extend immunity to any city exercising its police power. As Justice Lucas correctly realized in his dissent below,

> [t]o allow a local government entity to excuse a price fixing scheme on the basis of asserted public health, safety or welfare considerations would enmesh the court in an impossible task of weighing the 'apples' of social welfare with the 'oranges' of antitrust policy.

Juris. Stmt. App. 85.

Despite the California court's language to the contrary, the Berkeley rent control ordinance fails to meet the objectives of articulated state policy. Berkeley correctly points out that California statutes mandate that localities include a "housing

element" in their "general [development] plan". Cal. Govt. Code § 65300, 65302(i). Specifically, California requires that

> [t]he housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives and scheduled programs for the preservation, *improvement and development* of housing. The housing element shall identify adequate sites for housing, . . . and shall make adequate provision for existing and projected needs of *all economic segments* of the community.

Cal. Govt. Code § 65583 (emphasis supplied).

The Berkeley ordinance fails to adhere to this state policy on two grounds. First, the state policy calls for improvement and development of housing. An across the board rent control ordinance with a severely limited review process can only stifle such improvement and development. Rent control in essence freezes a landlord's potential return on his or her investment and severely discourages future investment in aesthetic amenities or building security. Further, rent control becomes an unreasonable restraint on alienation of leased property. Few potential buyers can be attracted to purchase or develop rental property where the return on their investment is frozen at 1980 levels.

Second, the state policy specifies that the locality's housing element must accommodate the needs of all economic segments of the community. Although some limited forms of rent control may prove desirable to preserve lower income housing, a blanket rent control ordinance has detrimental effects on middle and upper income housing. The owner of these types of units can only preserve his or her profits against inflation by limiting or removing building amenities such as recreational facilities and security systems. These common features will be denied to tenants who desire them because of the landlords' limited ability to collect a rent which reflects their costs. Thus, an across the board rent control ordinance like the Berkeley initiative fails to meet the needs of all economic segments of the community as mandated by the California legislature.

C. The California Supreme Court Misapplied its Own Novel Standard.

The Berkeley ordinance even fails to meet the new test created by the California Supreme Court to evaluate the initiative's compatability with the federal antitrust laws. That standard extends antitrust immunity to a municipality exercising its police power "unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by *means that would have a less intrusive impact on federal antitrust policies.*" Juris. Stmt. App. 31 (emphasis supplied). The California court upheld the ordinance in part because "plaintiffs suggest no alternative, equally effective approach. . . ." *Id.* at 33. This rationale suggests that the court expected plaintiffs to meet an as yet unannounced standard.

Dissenting Justice Lucas and various commentators have pointed out several alternatives to rent control which would achieve Berkeley's purposes while intruding less upon the federal antitrust domain. The key to minimizing the intrusion on procompetitive policies lies in maintaining the free market price of rental housing to the greatest possible extent. For example, Justice Lucas proposed public housing projects and the use of municipally-acquired properties. Juris. Stmt. App. 86. These plans could affect rents, but only in certain buildings and not in the community at large. One economist suggests a system of rent subsidies whereby the poor may buy government vouchers to pay for their housing. Baird at 88. This proposal would help the poor without distorting rents at all. In short, any scheme which spreads the financial burden of a housing program to all the taxpayers and not just to landlords would intrude far less upon the free market system than the Berkeley program at issue.

CONCLUSION

For the reasons set forth above, the judgment of the California Supreme Court should be reversed and the Berkeley ordinance declared void.

Respectfully submitted,

JOHN M. CANNON
SUSAN W. WANAT
ANN PLUNKETT SHELDON
Attorneys for *Amicus Curiae**

MID-AMERICA LEGAL FOUNDATION
Suite 1725
20 North Wacker Drive
Chicago, Illinois 60606
(312) 263-5163

* We wish to acknowledge the assistance of Bernard J. Bobber, student at Northwestern University School of Law, Michael J. Drooff, student at the University of Chicago Law School, and Thomas P. Fredell, student at the University of Michigan Law School.